90-1984

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PAMELA CHAMBERS GORMAN, Individually and as Administratrix of the Estate of DALE GORMAN, Deceased and as Next Friend of AMANDA MARIE GORMAN, a Minor,
Petitioners

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA AND TENNECO, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Does pre-emption under the Employee Retirement Income Security Act (ERISA) deprive a State court of jurisdiction to decide claims under State common law and the State Insurance Code so that the pre-emption defense can be raised for the first time on appeal?

2. Should *International Longshoremen's Ass'n v. Davis*, 476 U.S. 308 (1986) be reconsidered?

LIST OF PARTIES

Petitioners:

Pamela Chambers Gorman, Individually and as Administratrix of the Estate of Dale Gorman, Deceased, and as Next Friend of Amanda Marie Gorman, A Minor

Respondents:

Life Insurance Company of North America ("LINA")
Tenneco, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REFERENCES TO OPINIONS BELOW	1
GROUNDS OF JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR REVIEW	6
1. The Texas Supreme Court has decided a federal question in a way that conflicts with the decision of a United States court of appeals, other federal courts, and other state courts.	
2. The Texas Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court.	
A. The Texas Supreme Court Has Misconstrued ERISA.	6
B. The Texas Supreme Court Has Misconstrued Metropolitan Life.	8
C. The Opinion of the Texas Supreme Court Conflicts with the Opinions of a United States court of appeals and other courts.	9
D. The Texas Supreme Court's Construction of Federal Law Will Create Havoc for State Administration of Justice.	11
CONCLUSION	12
APPENDICES	1a

TABLE OF AUTHORITIES

CASES	Page
Arnold v. National County Mutual Fire Ins. Co., 725 S.W. 2d 165 (1987)	3
Barry v. Dyno Graphics Systems, Inc., 478 N.E.2d 707 (Mass. 1985)	9
Dueringer v. General American Life Insurance Co., 842 F.2d 127 (5th Cir. 1988)	10
Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1988 (9th Cir. 1986)	10
Heci Exploration Co., Inc. v. Holloway, 862 F.2d 513 (5th Cir. 1988)	10
Hughes v. Blue Cross of Northern California, 263 Cal. Rptr. 850 (Cal. App. 1st Dist. 1989)	10
International Longshoremen's Ass'n. v. Davis, 475 U.S. 380, 106 S. Ct. 1904, 90 L.Ed.2d 389 (1986)	11
Johnson v. Armored Transport of California, Inc., 813 F.2d 1041 (9th Cir. 1987)	10
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987)	8, 9
Pan American Line Ins. Co. v. Erbauer Construction Co., 805 S.W.2d 395 (Tex. 1991)	9
Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961)	6
Rehabilitation Institute of Pittsburgh v. Equitable Life Assurance Society of United States, 131 F.R.D. 99 (W.D. Penn. 1990)	10
Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983)	7
Southland Life Ins. Co. v. Estate of Small, 806 S.W.2d 800 (Tex. 1991)	9
Sweeney v. Westvaco Company, 926 F.2d 29 (1st Cir. 1991)	10
UNITED STATES CONSTITUTION	
Article III, Section 2	2, 6
UNITED STATES STATUTES	
29 U.S.C. § 1102	7
29 U.S.C. § 1109	7
29 U.S.C. § 1132	2
29 U.S.C. § 1132(e)(1)	6, 9
29 U.S.C. § 1144	2
29 U.S.C. § 1144(a)	6, 7
28 U.S.C. § 1257	2
TEXAS INSURANCE CODE	
Section 3.62	3

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

REFERENCES TO OPINIONS BELOW

The opinion of the Texas Supreme Court is found at ____ S.W.2d ____; 34 Tex. Sup. Ct. J. 457. The opinion of the Texas Court of Appeals is found at 752 S.W.2d 710.

GROUNDS OF JURISDICTION

1. The judgment sought to be reviewed was entered January 30, 1991.

2. Rehearing was denied (in part) and a revised opinion was issued on March 27, 1991.

3. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

This case involves 29 U.S.C. § 1132, 29 U.S.C. § 1144, and United States Constitution, Art. III, Sec. 2. These provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

Dale Gorman was killed in a traffic accident during working hours on August 4, 1982. (App. 3a, 21a). At the time of the accident, Mr. Gorman owned a $250,000 life insurance policy provided by his employer, Tenneco, which provided coverage if death occurred while in "travel and sojourn on the business of [Tenneco]." (App. 21a). Petitioners are the beneficiaries under the policy. (App. 3a).

A dispute developed concerning whether Mr. Gorman was on the business of Tenneco as required by the policy. (App. 21a). Petitioners submitted a claim for benefits which Tenneco forwarded to LINA. *Id.* In forwarding the claim Tenneco forwarded submitted the evidence tending to show that Mr. Gorman was *not* on the business of Tenneco, but neglected to forward to LINA substantial evidence in the possession of Tenneco tending to show that Mr. Gorman was on the business of Tenneco. (*Id.*). LINA

conducted no independent investigation and denied coverage. (*Id.*).

Petitioners filed suit against LINA and Tenneco in State district court. The theories alleged against LINA which are relevant here are breach of the insurance contract, breach of a common law duty of good faith[1], and violation of Sec. 3.62 of the Texas Insurance Code[2]. (App. 3a - 4a.) The pertinent claim against Tenneco was breach of common law fiduciary duties. (App. 3a).

Neither defendant pleaded ERISA pre-emption. (App. 10a, 23a). Trial was to a jury. The jury found: (1) Mr. Gorman was on travel or sojourn on the business of Tenneco at the time of the accident; (2) Tenneco breached common law fiduciary duties owed to Petitioners; (3) LINA breached its common law duty of good faith; and (4) various amounts of actual damages, exemplary damages, and attorneys' fees. (App. 2a, 9a, 22a).

Tenneco made a few evidentiary objections, a motion for directed verdict and a motion for judgment n.o.v

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1. *See* Arnold v. National County Mutual Fire Ins. Co., 725 S.W.2d 165 (1987).

2. This statute provides:

> In all cases where a loss occurs and the life insurance company, or accident insurance insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve (12%) per cent damages on the amount of such loss together with reasonable attorney fees for the prosecution and collection of such loss. Such attorney fee shall be taxed as a part of the costs in the case. The Court in fixing such fees shall take into consideration all benefits to the insured incident to the prosecution of the suit, accrued and to accrue on account of such policy.

based on ERISA preemption. (App. 22a - 23a). LINA did not join these motions.[3] (*Id.*) The trial court disregarded the jury verdict solely on the grounds of no evidence to support the jury finding that Mr. Gorman was on the business of Tenneco. (App. 22a). The trial court made no ruling on any other issue, and rendered a take nothing judgment. (*Id.*)

Petitioners brought an appeal to the Texas court of appeals. (App. 18a). The Court of Appeals ruled that: "A claim of federal pre-emption is a challenge to the court's subject matter jurisdiction and cannot be waived." (752 S.W.2d at 713; App. 23a). The court then addressed the merits of the pre-emption issue and ruled that all of Petitioners' causes of action, including the breach of contract claims, were pre-empted. (752 S.W.2d at 714; App. 26a).

Petitioners' application for writ of error to the Texas Supreme Court was granted. (App. 1a). That court ruled that "where ERISA's preemptive effect would result only in a change of the applicable law, preemption is an affirmative defense which must be set forth in the defendant's answer or it is waived." (App. 8a). The court proceeded to analyze each of the claims before it. The court acknowledged that the claim against Tenneco was "a claim for breach of fiduciary duties under state law theories." (App. 9a). Nevertheless, the court

3. LINA did contend at trial that Petitioners claim that there were misrepresentations in the Summary Plan Description was preempted. (App. 10a). Petitioners waived this claim by not submitting it to the jury. (App. 22a). The statement by the other Texas court of appeals that LINA raised any other preemption contention at trial is erroneous. However, both Texas appellate courts construed ERISA as jurisdictional. Both decisions were plainly based on Federal Law.

held: "Since the petitioner's claim for breach of fiduciary duty *relates to* an employee benefit plan governed by ERISA and is not a claim for benefits due under the policy or a suit to enforce rights under the policy, it falls within the exclusive jurisdiction of the Federal courts." (App. 10a). Thus, the court ruled that ERISA preemption did not need to be pleaded or raised at trial. (App. 9a - 10a).

Turning to the claims against LINA, the court first ruled that the breach of contract claim "may be characterized as a claim for benefits due under the plan." (App. 11a). Thus, the court ruled that the trial court had jurisdiction and ERISA preemption would not alter the outcome of the case. (App. 12a). With respect to the breach of duty of good faith and Insurance Code claims the court held: "All other ERISA actions fall within the exclusive jurisdiction of the Federal courts." Code claims the court held: "All other ERISA actions fall within the exclusive jurisdiction of the Federal courts." (App. 13a). Thus, the court held that preemption of these claims "is, if successful, jurisdictional and may therefor be raised for the first time on appeal." (App. 13a - 14a).

Thus, the Texas Supreme Court reversed the take nothing judgment on the claim against LINA for breach of contract, attorneys' fees , and pre-judgment interest and remanded for further proceedings. (App. 16a). The denial of the claims against LINA for breach of duty of good faith and under the Insurance Code was affirmed. The denial of the claim against Tenneco was affirmed. (*Id.*).

REASONS FOR REVIEW

1. **The Texas Supreme Court has decided a federal question in a way that conflicts with the decision of a United States court of appeals, other federal courts, and other state courts.**

2. **The Texas Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court.**

A. The Texas Supreme Court Has Misconstrued ERISA.

The error that permeates the entire opinion of the Texas Supreme Court is failure to distinguish "relate[s] to" in 29 U.S.C. 1144(a) from "under this subchapter" in 29 U.S.C. § 1132(e)(1). Section 1132 (e)(1) gives federal courts exclusive jurisdiction of all actions brought "under this subchapter" except actions to recover benefits under a plan, enforce rights under a plan, or to clarify rights under a plan. The language "under this subchapter" is clearly derived from United States Constitution, Art. III, Sec. 2: "The judicial power shall extend to all cases, in law and equity, *arising under* this Constitution, the laws of the United States and Treaties . . ." (emphasis added) This Court has consistently held that for a cause of action to "arise under" federal law "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of plaintiff's cause of action." *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961). Thus, a cause of action is not brought "under this subchapter" within the meaning of 29 U.S.C. (e)(1) unless ERISA provides an essential element of plaintiff's case.

This Court has also consistently construed "relates to" in Sec. 1144(a) of ERISA: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983). Clearly, a state cause of action can "relate to" an ERISA plan without rights under ERISA forming "an element, and an essential one, of plaintiff's cause of action." The Texas Supreme Court, however, has equated the two terms: "Since petitioner's claim . . . *relates to* an employee benefit plan and is not a claim for benefits due . . . it falls within the exclusive jurisdiction of the Federal Courts." (App. 10a).

The claims litigated here were not brought "under" ERISA. The claims against Tenneco was for breach of fiduciary duties owed to Petitioners under common law. These duties existed independent of ERISA. The cause of action for breach of fiduciary duties which is created by ERISA allows the *plan* to recover for breach of duties by an ERISA fiduciary. *See* 29 U.S.C., Sec. 1109. This was a suit by individuals, not on behalf of the plan. The employer, as such, is not an ERISA fiduciary. *See* 29 U.S.C., Sec. 1102. Thus, the claim against Tenneco may very well "relate to" an employee benefit plan, but it was not brought "under" ERISA because no provision of ERISA formed "an element, and an essential one, of plaintiff's cause of action."

Likewise, the breach of duty of good faith and Insurance Code claims against LINA were not brought "under" ERISA. There is no provision of ERISA which provides these types of claims. Nothing created by ERISA

formed an element of plaintiff's cause of action. These claims, likewise, "relate to" an employee benefit plan, but were not brought "under" ERISA.

Nothing in ERISA purports to give federal courts exclusive jurisdiction over claims which merely "relate to" an employee benefit plan. The conclusion of the Texas Supreme Court that federal courts had exclusive jurisdiction over these claims cannot stand.

B. The Texas Supreme Court Has Misconstrued Metropolitan Life.

The Texas Supreme Court rejected the above reasoning on the basis of *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987). There, this Court addressed the question of whether a complaint purporting to raise only state law causes of action, but seeking benefits under an ERISA plan, can be removed to federal court. This Court held that such a complaint "is necessarily federal in character . . . therefore, 'arise[s] under the laws . . . of the United States' . . . and is removable to federal court." 481 U.S. at 67.

The Texas Supreme Court apparently read this to mean that the preemptive effect of ERISA not only converts the claim for ERISA benefits into a federal claim but also converts the claims for breach of common law fiduciary duties, breach of a duty of good faith, and violation of the Texas Insurance Code into federal claims. Furthermore, these new "federal claims" are *not* claims for benefits under the plan, to enforce rights under the plan, or to clarify rigths under the plan. Otherwise, the state courts would have jurisdiction. Instead, the Texas Supreme Court has apparently held that claims (other

than claims for benefits) which "relate to" an ERISA plan are converted by preemption into other federal claims "under" ERISA which are within the exclusive jurisdiction of the federal courts under 29 U.S.C. § 1132(e)(1).

Metropolitan Life certainly lends no support to this conclusion. This Court merely held that a party may not avoid removal by artfully pleading a truly federal claim under state law theories. There are *no* federal claims corresponding to the state claims for breach of fiduciary duties, breach of a duty of good faith, and breach of the Insurance Code. Thus, there is no federal claim into which these claims can be converted. The implicit holding of the Texas Supreme Court that these claims were converted by ERISA preemption into some other (undefined) ERISA claims within the exclusive jurisdiction of the federal courts is unsupportable.

C. The Opinion of the Texas Supreme Court Conflicts with the Opinions of a United States Court of Appeals and other courts.

Texas Supreme Court has now three times held that an insurance company may claim ERISA preemption for the first time on appeal. *See, Pan American Line Ins. Co. v. Erbauer Construction Co.*, 805 S.W.2d 395 (Tex. 1991); *Southland Life Ins. Co. v. Estate of Small*, 806 S.W.2d 800 (Tex. 1991). One other court has held that ERISA preemption is jurisdictional. *Barry v. Dyno Graphics Systems, Inc.*, 478 N.E.2d 707 (Mass. 1985).

This position is in conflict with the position of the Fifth Circuit. That court previously held that the issue of whether ERISA preempts state common-law actions

must be asserted as an affirmative defense and cannot be raised for the first on appeal. *Dueringer v. General American Life Insurance Co.*, 842 F.2d 127, 129 (5th Cir. 1988). *See also, Heci Exploration Co., Inc. v. Holloway*, 862 F.2d 513 (5th Cir. 1988).

The holding of the Texas Supreme Court also conflicts with the holding of other lower courts. For instance, in *Rehabilitation Institute of Pittsburgh v. Equitable Life Assurance Society of United States*, 131 F.R.D. 99 (W.D. Penn. 1990) the Court held that ERISA preemption is a waivable affirmative defense because ERISA preemption operates as a choice of law defense. 131 F.R.D. at 101. The California state appellate court in *Hughes v. Blue Cross of Northern California*, 263 Cal. Rptr. 850 (Cal. App. 1st Dist. 1989), held that the issue of ERISA preemption is a choice of law question that can be waived. 263 Cal. Rptr. at 860. The earlier Ninth Circuit cases of *Johnson v. Armored Transport of California, Inc.*, 813 F.2d 1041 (9th Cir. 1987) and *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1988 (9th Cir. 1986) also hold that in a preemption argument that affects the choice of law rather than the choice of a forum is available. *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1497. Although these cases did not deal specifically with ERISA, they did address analogous provisions of the National Labor Relations Act and the Labor Management Relations Act. *Accord, Sweeney v. Westvaco Company*, 926 F.2d 29 (1st Cir. 1991).

The amount of litigation involving ERISA is ever increasing. The question of whether preemption is jurisdictional and can be raised for the first time on appeal is likely to frequently recur. If the ruling of the Texas Su-

preme Court is allowed to stand, there is potential for disrupting orderly court proceedings in both state and federal courts. This Court should resolve the conflict.

D. The Texas Supreme Court's Construction of Federal Law Will Create Havoc for State Administration of Justice.

This record reflects extensive pretrial discovery and a lengthy trial. According to the jury verdict, the plaintiffs' attorneys invested over $100,000 worth of time and expenses into the case. The record reflects that the defendants expended comparable sums. A precious courtroom and busy judge in the most populous (and probably most congested) county in Texas were occupied with this case for many weeks, including pre-trial proceedings, trial, and post-trial proceedings.

Neither defendant pleaded ERISA, and neither defendant even suggested that ERISA might apply until the very eve of trial. LINA, in particular, never raised its contention that ERISA preempted the breach of contract, breach of duty of good faith, and Insurance Code claims until the case was pending before the Texas Court of Appeals. The Texas Supreme Court has now ruled that most of the issues which were tried were jurisdictionally preempted. As a result, much of the pretrial discovery and much of the trial was wasted effort.

Although the ruling that there was jurisdictional preemption was probably erroneous in this instance, the concept of jurisdictional preemption makes cases such as this inevitable. Petitioners respectfully urge this Court to reconsider its ruling in *International Longshoremen's Ass'n. v. Davis*, 475 U.S. 380, 106 S. Ct. 1904, 90 L.Ed. 2d. 389 (1986).

CONCLUSION

Petitioners urge the Court to grant certiorari, reverse the judgment of the Texas Supreme Court, and remand for further proceedings.

Respectfully submitted,

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APPENDICES

OPINION OF THE SUPREME COURT OF TEXAS

PAMELA CHAMBERS GORMAN,
INDIVIDUALLY ETC.

vs.

LIFE INSURANCE COMPANY OF
NORTH AMERICA ET AL.

No. C-7806

From Harris County, First District.

Motions for rehearing of cause are overruled. The opinion of this Court of January 30, 1991, which are reported at 34 Tex. Sup. Ct. Jour. 304, are withdrawn and the opinions delivered this date are substituted therefor.

Opinion on motion for rehearing by Justice Gonzalez. Concurring opinion on motion for rehearing by Justice Doggett, joined by Justices Mauzy and Gammage.

OPINION ON MOTION FOR REHEARING

The opinion of January 30, 1991 is withdrawn and the following is substituted. Petitioners' motion for rehearing is granted in part and overruled in part. Respondent Life Insurance Company of North America's motion for rehearing is overruled.

The primary issue in this appeal involves determining the effect of the preemption provision of the federal

Employees' Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1001-1461 (1988). Beneficiaries under an accidental death policy that formed part of an employee benefit plan brought suit against the employer and the benefit plan insurer for various state law causes of action[1] after a claim for benefits was denied. After a trial before a jury, the plaintiffs were awarded substantial damages.

After concluding that there was no evidence to support the jury question addressing the key issue of whether Gorman was working at the time of his accident,[2] the trial court granted the defendants' motion for judgment *non obstante veredicto* and ordered that plaintiffs take nothing. The court of appeals, reasoning that the trial court lacked subject-matter jurisdiction of the plaintiffs' state law claims, held that 1) the trial judge erred in entering the judgment n.o.v.; and 2) the plaintiffs failed to prove that they were entitled to recover under the pro-

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1. The Gormans brought suit against Life Insurance Company of North America (LINA) and Tenneco for breach of contract, common law fraud, breach of fiduciary duty, breach of duty of good faith and fair dealing, negligence, statutory violations under Texas Insurance Code articles 3.62 and 21.21, violations of applicable regulatory orders issued by the State Board of Insurance, and deceptive trade practices under Texas Business & Commerce Code §§ 17.46-17.62. On appeal, based on the jury verdict, they seek to recover against LINA for breach of contract, gross negligence and violation of Texas Insurance Code art. 3.62, and against Tenneco for breach of fiduciary duty.

2. Question No. 1:

> Do you find from a preponderance of the evidence that at the time of his death, Dale Gorman was in travel and sojourn on the business of Tennneco.
>
> Answer: "We do" or "We do not"
>
> Answer: We do.

visions of ERISA.[3] Although the court of appeals reversed the judgment of the trial court, for different reasons it also rendered judgment that the plaintiffs take nothing. 752 S.W.2d 710. We reverse in part the judgment of the court of appeals and affirm in part.

THE FACTS AND NATURE OF THE DISPUTE

Dale Gorman was killed in an automobile collision in Houston. He was an employee of Tenneco, Inc., and was insured under an insurance policy issued by Life Insurance Company of North America ("LINA"); the policy was provided for Gorman by Tenneco. Pamela Chambers Gorman, his wife, and Amanda Marie Gorman, his minor daughter, the designated beneficiaries under this policy, claimed that Gorman's death was covered under the policy and sought benefits. LINA, acting upon Tenneco's recommendation, denied coverage. Thereafter, petitioners filed this lawsuit against both Tenneco and LINA alleging numerous causes of action. On appeal, based on the jury verdict, they seek judgment against Tenneco for breach of fiduciary duties and against LINA for breach of con-

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3. The court of appeals assumed without deciding that the Gormans' pleadings were broad enough to state a claim under ERISA. However, the court of appeals held that the Gormans failed to prove that the benefits were denied arbitrarily or capriciously. Thus, the court of appeals held that the Gormans did not prevail on the ERISA claim. We note that this decision was handed down prior to the United States Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989). That decision clarified that the deferential arbitrary and capricious standard of review is only applied to ERISA claims challenging the denial of benefits under an ERISA plan when the plan expressly provides that the plan administrator or fiduciary is given discretion to determine eligibility for benefits or to construe the terms of the plan. Otherwise, the *de novo* standard is to apply. Before *Bruch*, a majority of the circuit courts applied the arbitrary and capricious standard to review ERISA claims challenging denial of benefits under a plan.

tract, violation of Texas Insurance Code article 3.62 and gross negligence. Among the items of damages they seek to recover are attorney's fees, prejudgment interest, mental anguish and exemplary damages for gross negligence.

Tenneco and LINA contend that petitioners' causes of actions are preempted by ERISA because they "relate to" an employee benefit welfare plan organized pursuant to the authority and requirements of ERISA. *See* 29 U.S.C. 1144(a) (1988); *Cathey v. Metropolitan Life Ins. Co.*, ___ S.W.2d ___, ___ (Tex. 1991). In the event the court finds that petitioners' claims are not preempted, the respondents also argue that there was no evidence to support the jury finding that Dale Gorman was "in travel or sojourn on the business of Tenneco" at the time of his accident.

ERISA explicitly supersedes or "preempts" state laws to the extent that they "relate to" employee benefit plans not exempt from federal regulation. *Id.* This preemption provision is modified by a so-called "saving clause" which provides that state laws regulating insurance, banking, or securities are not preempted. *See id.* § 1144(b)(2)(A). Because ERISA's preemption and saving clauses "perhaps are not a model of legislative drafting," disputes as to the nature of their effect are becoming commonplace. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). In the instant case, we are called upon to decide the nature of ERISA's preemptive effect.

At the heart of the present dispute is whether, given the facts of this case, ERISA, preemption implicates the subject-matter jurisdiction of the court or merely affects which law is to be used in the case. A preemption argument that affects the choice of forum rather than the

choice of law is not waivable and can be raised for the first time on appeal. *See International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 397 (1986); *Gilchrist v. Jim Slemmons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1986); *see also Dueringer v. General Am. Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988); *Castillo v. Neely's TBA Dealer Supply, Inc.*, 776 S.W.2d 290, 292 (Tex. App.—Houston [1st Dist.] 1989, writ denied); *Great N. Am. Stationers, Inc. v. Ball*, 770 S.W.2d 631, 632 (Tex. App.—Dallas 1989, writ dism'd as moot).

LINA and Tenneco contend that the preemptive effect of ERISA in this case was invoked by their repeated objections in the trial court that petitioners' causes of action were preempted by ERISA, and that its invocation deprived the trial court of subject-matter jurisdiction over the case. Alternatively, both LINA and Tenneco maintain that, because ERISA's preemptive effect deprives the trial court of subject-matter jurisdicton, they need not have raised ERISA preemption at trial—matters going to the subject-matter jurisdiction of the court may be raised for the first time on appeal. *See Texas Employment Comm'n v. International Union of Elec., Radio & Mach. Workers Local 782*, 352 S.W.2d 252, 253 (Tex. 1961).

Petitioners assert that ERISA preemption, to the extent that it is applicable, merely affects which law is to be used in the case; it does not deprive the court of subject-matter jurisdiction. They reason that unless the cause of action alleged is created by ERISA or contains a right or immunity created by ERISA as an element, the suit is not brought "under" ERISA[4] and thus is not within the ex-

4. This contention does not comport with *Metropolitan Life Insurance Co. v. Taylor*, wherein the Supreme Court stated that a suit to recover benefits due under an employee benefit plan, "though

clusive jurisdiction of the federal courts. Accordingly, they maintain that ERISA must be pleaded and proved or it is waived.

SUBJECT-MATTER JURISDICTION UNDER ERISA

Sections 1132(a)(1)(B) and (e) of ERISA provide that state courts of competent jurisdiction and district courts of the United States have concurrent jurisdiction of actions by a beneficiary: 1) to recover benefits due under the terms of the plan; 2) to enforce rights under the plan; or 3) to clarify rights to future benefits. Any other civil ERISA action is within the exclusive jurisdiction of the federal courts. 29 U.S.C. § 1132(e)(1) (1988). Accordingly, when a state court suit alleged in terms of a state common-law or statutory cause of action "relates to" an employee welfare benefit plan, ERISA may prempt the state law in favor of federal law. If, however, the state-law cause of action falls within the scope[5] of one of the three aforementioned classes of actions that are not entrusted exclusively to federal court jurisdiction, the state court has concurrent jurisdiction over the action even in the face of a timely and successful assertion of ERISA preemption and, in the absence of removal to the federal courts, may properly decide the

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it purports to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress. It, therefore, 'arise[s] under the . . . laws . . . of the United States.'" 481 U.S. 58, 67 (1987); *see also Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 762 (5th Cir. 1989); *Degan v. Ford Motor Co.*, 869 F.2d 889, 893 (5th Cir. 1989).

5. *Cf. Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 762 (5th Cir. 1989) (state-law claim to recover benefits from ERISA plan comes within scope of 29 U.S.C. § 1132(a)(1)(B)). State courts have concurernt jurisdiction to adjudicate ERISA claims that fall within the scope of § 1132(a)(1)(B), 29 U.S.C. § 1132(e) (1988).

case under the provisions of ERISA. *See Ames v. Ames*, 776 S.W.2d 154, 157-58 (Tex. 1989), *cert. denied*, 110 S. Ct. 1809, 108 L.Ed.2d 939 (1990); *Commercial Life Ins. Co. v. Superior Court*, 764 P.2d 1059 (Cal. 1988), *cert. denied sub nom. Juliano v. Commercial Life Ins. Co.*, 109 S. Ct. 2087, 104 L.Ed.2d 651 (1989); *Duffy v. Brannen*, 529 A.2d 643, 649-50 (Vt. 1987); *Rodriguez v. Travelers Ins. Co.*, 775 P.2d 973, 974-75 (Ct. App.), *review denied*, 781 P.2d 1323 (Wash. 1989). An assertion of ERISA preemption in such a case would affect only the choice of law, not the choice of forum. *See Gilchrist*, 803 F.2d at 1497; *Ames*, 776 S.W.2d at 157-58.

ERISA PREEMPTION: AN AFFIRMATIVE DEFENSE?

Petitioners contend that ERISA preemption is an affirmative defense. Pleading an affirmative defense permits introduction of evidence which does not tend to rebut the factual propositions asserted in the plaintiff's case, but which seeks to establish an independent reason why the plaintiff should not recover. 2 R. McDONALD, TEXAS CIVIL PRACTICE § 7.34.1 (1982); *see also Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W.2d 444, 448 (Tex. 1967); *W. L. Moody & Co. v. Rowland*, 99 S.W. 1112, 1115 (Tex. 1907). In short, an affirmative defense is one of avoidance, rather than a defense in denial.

A number of federal courts have held that ERISA preemption, when it operates to displace state law in favor of federal law, is waived if not timely asserted as an affirmative defense. *See In re HECI Exploration Co.*, 862 F.2d 513, 518-20 (5th Cir. 1988); *Dueringer v. Gen. Am. Life Ins. Co.*, 842 F.2d 127, 129-30 (5th Cir. 1988); *Gilchrist*, 803 F.2d at 1497; *Johnson v. Armored Transp.*,

Inc., 813 F.2d 1041, 1043-44 (9th Cir. 1987); *Rehabilitation Inst. v. Equitable Life Assurance Soc'y of the U.S.*, 131 F.R.D. 99, 100-01 (W.D. Pa. 1990); *see also Castillo*, 776 S.W.2d at 293; *Hughs v. Blue Cross*, 263 Cal. Rptr. 850, 861 (Ct. App. 1989), *cert. dismissed*, 110 S. Ct. 2200, 109 L.Ed.2d 527 (1990); *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 n.1 (Minn. 1989). We are in accord and hold that, where ERISA's preemptive effect would result only in a change of the applicable law,[6] premption is an affirmative defense[7] which must be set forth in the defendant's answer or it is waived.[8]

PETITIONERS' CLAIMS AGAINST TENNECO

We must now decide whether petitioners' state-law claim against Tenneco falls within the scope of section 1132(a)(1)(B), which enumerates the three types of ERISA claims that state courts may hear: 1) a claim to recover benefits due under the terms of the plan; 2) an action to enforce rights under the plan; or 3) an action

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6. In state court, such a situation arises when the defendant successfully asserts ERISA preemption as a defense to a state-law cause of action seeking benefits due under the terms of the plan. *See Ames*, 776 S.W.2d 157-58.

7. Placing the burden on the defendant to plead and prove the applicability of ERISA preemption is consistent with the U.S. Supreme Court's statement in *Metropolitan Life Insurance Co. v. Massachusetts that* "[t]he presumption is against preemption." 471 U.S. 724, 741 (1985).

8. Texas Rule of Civil Procedure 94 requires that matters constituting an avoidance or affirmative defense must be set forth affirmatively. "The purpose of rule 94 . . . 'is to require the defendant to announce in his pleadings what his defense will be . . . and to give the plaintiff the opportunity of knowing what character of proof he may need to meet the defenses pleaded." *Reid v. Associated Employers Lloyds*, 164 S.W.2d 584, 585 (Tex. Civ. App.—Fort Worth 1942, writ ref'd); *see also Davis v. City of San Antonio*, 752 S.W.2d 518, 519 (Tex. 1988).

to clarify rights to future benefits. 29 U.S.C. § 1132(a)(1)(B) (1988). If it does not, then a successful assertion of ERISA preemption would deprive state courts of subject-matter jurisdicton to hear the claim. Tenneco contends that petitioners are pursuing only a state common-law breach of fiduciary duty claim on appeal. A claim for breach of fiduciary duty that relates to the administration of an ERISA plan falls within the exclusive jurisdiction of the federal courts, and state courts therefore may not hear such claims. 29 U.S.C. § 1132(e)(1) (1988). If Tenneco is correct, its claims of ERISA preemption go to the subject-matter jurisdiction of the trial court and may therefore be raised for the first time on appeal.

Petitioners alleged numerous causes of action against Tenneco, including a claim for breach of fiduciary duties under state law theories. In their petition, petitioners alleged that "[b]y procuring insurance coverage for its employees, Tenneco, Inc. operated in the capacity of a fiduciary and an insurer for its employes." Petitioners also alleged that Tenneco "assumed the duties of a fiduciary as to its employees generally." These allegations were followed by specific acts allegedly in breach of this fiduciary duty. Furthermore, in the court's charge the petitioners secured questions which asked the jury whether Tenneco had a fiduciary duty to them, whether any such duty was breached, and whether such breach was a proximate cause of any damage to them. And on appeal to this court, petitioners seek judgment on this ground to the exclusion of their other causes of action against Tenneco.

Tenneco's objection that ERISA preempts petitioners' cause of action against them for breach of fiduciary duty must be heard by this court; it is jurisdictional in nature

and cannot be waived. Since the petitioners' claim for breach of fiduciary duty relates to an employee benefit plan govered by ERISA and it is not a claim for benefits due under the policy or a suit to enforce rights under the policy, it falls within the exclusive jurisdiction of the federal courts. Thus, the trial court did not have jurisdiction to hear this claim because ERISA preempted subject-matter jurisdiction. *See* 29 U.S.C. §§ 1132(a)(1)(B), (e)(1); *see also International Longshoremen,* 476 U.S. at 397. We therefore agree with the opinion of the court of appeals insofar as it holds that petitioners' breach of fiduciary duty claim against Tenneco is prempted by ERISA.

PETITIONERS' CLAIMS AGAINST LINA

We now address petitioners' claims against LINA. On appeal to this court, petitioners maintain that judgment should be rendered against LINA on the basis of the jury's finding that Gorman was "in travel and sojourn" for Tenneco at the time of his death. This finding established that LINA breached the contract of insurance that it had entered into with Gorman. Petitioners also seek statutory penalties, attorney's fees, prejudgment interest, damages for mental anguish and prejudgment interest thereon, and exemplary damages. LINA did not raise ERISA preemption with regard to any of these causes of action by an affirmative written pleading in the trial court. During pretrial hearings on the first day of trial, LINA filed a motion to strike Gorman's pleadings of causes of action relating to the Summary Plan Description alleging that ERISA prempted them. Because of the differing effects of choice of law premption and choice of forum preemption we will address the claims separately.

A. Breach of Contract

As noted above, sections 1132(e)(1) and (a)(1)(b) of ERISA, which delimit the types of ERISA actions that may be brought in state courts, confer concurrent jurisdiction upon state courts to award benefits due under the terms of an employee benefit plan. Thus, even if LINA had timely pled ERISA preemption, the trial court would not have been deprived of subject-matter jurisdiction over petitioners' breach of contract claim because it may be characterized as a claim for benefits due under the terms of the plan.[9] *See Ames*, 776 S.W.2d at 157-58; *see also Davis v. John Alden Life Ins. Co.*, 746 F. Supp. 44, 47 (D. Kan. 1990) (in case involving removal jurisdiction, state law breach of contract claim could be recharacterized as action to recover benefits under ERISA, thus state court had jurisdiction but case was subject to removal). Here, the court of appeals assumed without deciding that the Gorman's pleadings stated a cause of action to recover benefits due under the plan. After making this assumption, the court of appeals determined that the denial of benefits was subject to review under the arbitrary and capricious standard. It concluded that the Gormans did not establish that the insured acted arbitrarily or capriciously in denying the claim. Thus, the court of appeals rendered judgment for the defendants on the assumed ERISA claim.

We note, however, that the United States Supreme Court's holding in *Firestone Tire & Rubber Co. v. Bruch*

9. The fact that the claim is alleged in terms of state law does not preclude the court from adjudicating the case under the provisions of ERISA if state law is found to be preempted. "It is a general rule . . . that the petition will be construed as favorably as possible for the pleader." *Gulf, Colo. & Sta. F. Ry. v. Bliss*, 368 S.W.2d 594, 599 (Tex. 1963).

would control the decision in this case because it clarified when the *de novo* and arbitrary and capricious review standards apply in ERISA cases brought under § 1132 (a)(1)(B), 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989). The *Firestone* opinion established that a *de novo* review standard applied to these ERISA claims unless the plan expressly provided that the plan administrator or fiduciary had discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Id. at :_____, 109 S. Ct. at 956, 103 L.Ed.2d at 95. The Supreme Court noted that the basis for the *de novo* review is consistent with the courts' treatment of actions challenging denial of benefits before ERISA. The Court stated: Actions challenging an employer's denial of benefits before enactment of ERISA were governed by the principals [sic] of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claims as it would any other contract claim—by looking to the terms of the plan and other manifestations of the parties' intent.

Id. at ____, 109 S. Ct. at 955, 103 L.Ed.2d at 94. Imposition of the arbitrary or capricious standard would afford employees less protection than they enjoyed before ERISA. *Id.* Given this guidance, we hold that the *de novo* standard would have applied to an ERISA claim in this case because the policy does not expressly give LINA discretion to determine eligibility for benefits. Since an ERISA claim for benefits due under the plan would have applied the principles of contract law, the results would not have *differed*. Therefore, the raising of ERISA preemption does not alter the outcome of this case as either state or federal law would have dictated the same

result. Therefore, the issue of whether LINA timely raised ERISA preemption is academic in this case and we do not reach it. Thus, we hold that petitioners' claim for the $250,000 in benefits due under the policy is not affected by the defense of ERISA preemption.

B. Attorney's Fees

ERISA also authorizes state courts to award reasonable attorney's fees and costs to either party. 29 U.S.C. § 1132(g)(1); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Accordingly, a successful assertion of ERISA preemption would not have deprived the state court of concurrent jurisdiction to award attorney's fees. Therefore, the trial court had jurisdiction to award attorney's fees.

C. Article 3.62, Mental Anguish, and Exemplary Damages

State courts are vested with concurrent jurisdiction by sections 1132(a)(1)(B) and (e) to adjudicate ERISA claims 1) for benefits due under the terms of the plan[10]; 2) to enforce rights under the plan; 3) to clarify rights to future benefits. All other ERISA actions fall within the exclusive jurisdiction of the federal courts. *See* 29 U.S.C. § 1132(e) (1988). Accordingly, for state-law claims that do not fall within the scope of one of these three categories, an assertion of ERISA preemption is, if successful, jurisdictional and may therefore be raised for

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10. A majority of the courts that have addressed the issue of how broadly to construe the phrase "under the terms of the plan," as it is used in section 1132(a)(1)(B), have opted for a restrictive interpretation. *See Ames*, 776 S.W.2d at 161 (Gonzalez, J., concurring and dissenting).

the first time on appeal. *See Texas Employment Comm'n*, 352 S.W.2d at 253 (matters going to the subject-matter jurisdiction of a court may be raised for the first time on appeal). The remainder of the petitioners' claims fall outside the scope of the aforementioned categories. Therefore, LINA's assertion of ERISA preemption as to those claims for damages precludes recovery.

LEGAL SUFFICIENCY

The trial court entered judgment n.o.v. because it found that there was no evidence to support the jury's finding that Dale Gorman was on company business when the accident occurred. The Gormans argue that there is some evidence to support the jury's verdict. We must reach the merits of this issue because we hold that the trial court had jurisdiction to determine the Gormans' right to recovery whether the cause was for breach of contract or an ERISA claim for benefits due under the plan.

It is uncontroverted that Dale Gorman was attending a seminar away from his office at Tenneco on the day of his death. The evidence establishes that he left the seminar at noon and attended a meeting at Tenneco at 2:00 p.m. According to witnesses who also attended the seminar, Gorman informed another attendee that he had a meeting at his office but he would try to return to the afternoon session of the seminar. A witness who attended the meeting at Tenneco testified that Gorman left the meeting early and stated that he was going to return to the seminar. Although there was testimony that the location of the accident was not on the most direct route to the seminar, there was also evidence that it was not on the most direct route to Gorman's home. Given this evidence, the jury could

have inferred from the testimony that Gorman was on business at the time of the accident. *See Briones v. Levine's Dep't Store, Inc.*, 446 S.W.2d 7, 10 (Tex. 1969) (jury finding may be based on inference fairly drawn from facts in evidence); *Kentucky Cent. Life Ins. Co. v. Fannin*, 575 S.W.2d 76, 80 (Tex. Civ. App.—Amarillo 1978, no writ) (jury privileged to believe all, part or none of witness testimony and draw reasonable inference from facts proved). Reviewing this evidence in the light most favorable to the jury verdict, we conclude that there was some evidence to support the jury's finding. Therefore, we remand the cause to the court of appeals to review the factual sufficiency points raised by LINA.

PREJUDGMENT INTEREST

The petitioners seek to recover prejudgment interest. However, as a federal cause of action, and ERISA claim is governed by federal law which contains no specific authorization for prejudgment interest. *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1219 (8th Cir.), *cert. denied*, 454 U.S. 1084 (1981). Nevertheless, under federal case law, the trial court is accorded discretion to award prejudgment interest. *Moon v. American Home Assur. Co.*, 888 F.2d 86, 90 (11th Cir. 1989); *see also Whitfield v. Lindemann*, 853 F.2d 1295, 1306 (5th Cir. 1988), *cert. denied sub nom., Klepak v. Dole*, ____ U.S. ____, 109 S. Ct. 2428, 104 L.Ed.2d 896 (1989); *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir.), *cert. denied, sub nom., Cody v. Donovan*, 469 U.S. 1072 (1984). One state court has interpreted these cases to allow recovery of prejudgment interest in ERISA actions brought in state court. *Evans v. W.E.A. Ins. Trust*, 361 N.W.2d 630, 639 (Wis. 1985). We agree with the Wisconsin Supreme Court's statement that "the tenor of the Act would appear to afford

an equal remedy whether the action was brought in state or federal court." *Id.* Thus we hold that the trial court has discretion to award prejudgment interest in ERISA cases. If the court of appeals finds that the evidence is factually sufficient to support the verdict, it should remand this cause to the trial court to determine whether, in its discretion, the Gormans are entitled to prejudgment interest. *Moon*, 888 F.2d at 90. If awarded, the interest rate to be applied is governed by Texas law. *Dependahl*, 653 F.2d at 1219-20.

CONCLUSION

Accordingly, we hold that ERISA is not a bar to recovery in this case. We further hold that there was some evidence to support the jury finding that Gorman was on travel and sojourn for his employer at the time of his death. We agree with the court of appeals' that ERISA preempted recovery of punitive damages, and mental anguish damages from LINA.

Judgment of the court of appeals that petitioners take nothing from Tenneco is affirmed. As to petitioners' claims against LINA, the cause is reversed and remanded to the court of appeals for further proceedings consistent with this opinion.

RAUL A. GONZALEZ
Justice

OPINION DELIVERED: March 27, 1991.

Concurring opinion on motion for rehearing by Justice Doggett joined by Justice Mauzy and Gammage.

CONCURRING OPINION ON MOTION FOR REHEARING

The concurring opinion of January 30, 1991 is withdrawn and the following is substituted.

I reluctantly concur based upon the analysis provided in my concurrence in the companion case of *Cathey v. Metropolitan Life Ins. Co.*, ____ S.W.2d ____ The court notes that "for state-law claims that do not fall within the scope of one of these three categories, an assertion of ERISA preemption is, if successful, jurisdictional and may therefore be raised for the first time on appeal." *Id.* at ____. The harsh effect of this conclusion is that an insurer may now defeat a claim by asserting an ERISA defense for the first time on appeal after a Texas judge and jury have found it guilty of engaging in false, misleading or deceptive acts or breaching its duty of good faith and fair dealing. What was designed to protect workers has now become a vehicle for insurers to evade that protection.

Furthermore, I believe that in exercising its discretion on remand the trial court should consider our uniform policy permitting the recovery of prejudgment interest *See, e.g., Rio Grande Land & Cattle Co. v. Light*, 758 S.W.2d 747, 748 (Tex. 1988) (per curiam) (awarding prejudgment interest discourages delay and encourages compromise); *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 930 (Tex. 1988); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985).

LLOYD DOGGETT
Justice

Justices Mauzy and Gammage join in this concurring opinion.

OPINION DELIVERED: March 27, 1991.

Pamela Chambers GORMAN, Individually and as Administratrix of the Estate of Dale Owen Gorman, Deceased, and Amanda Marie Gorman, a minor, Appellants,

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA and Tenneco, Inc., Appellees.

NO. 01-86-00501-CV.

Court of Appeals of Texas,

Houston (1st Dist.).

June 9, 1988.

Rehearing Denied July 14, 1988.

Clinard J. Hanby, Haynes & Fullenweider, Houston, for appellants.

Arthur Stamm, Baker & Botts, Daniel C. Pappas, Kissner & Pappas, Roger Townsend, Fulbright & Jaworski, Houston, for appellees.

Before DUGGAN,WARREN and LEVY, JJ.

OPINION ON REHEARING

DUGGAN, Justice.

The opinion issued March 17, 1988 is withdrawn.

After a jury awarded the appellants $1,948,000 plus attorney's fees for breach of contract and tortious actions

by the appellees, the trial court entered a take-nothing judgment in response to the appellees' motion for judgment n.o.v.

Appellants assert the trial court erred in disregarding the jury's answer to a special issue, in granting the judgment n.o.v., and in excluding certain evidence. Appellees assert in cross-points that ERISA preempts appellants' state law claims. Due to the jurisdictional nature of the ERISA preemption question, we first consider appellees "pre-emption" cross-points.

Appellants, Pamela Chambers Gorman, and Amanda Marie Gorman, the widow and minor daughter of Dale Owen Gorman, deceased, were the designated beneficiaries under an insurance policy provided by the deceased's employer, appellee Tenneco, Inc. ("Tenneco"), and its insurer, appellee Life Insurance Company of North America ("LINA").

The insurance policy in question was part of Tenneco's Employee Benefit Welfare Plan ("the Plan"). The Plan was organized pursuant to the authority and the requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (1982).

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. It sets minimum uniform standards for employee benefit plans and provides for uniform remedies in the enforcement of the plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983).

ERISA explicitly supersedes or "preempts" state laws to the extent that they "relate to" employee benefit plans

not exempt from federal regulation. 29 U.S.C. § 1144 provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.
>
> (c) For purposes of this section: 1) The term "State Law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.

ERISA provides for actions by claimants in § 1132, which states in pretinent part:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary
>
> (A) for the relief provided for in Subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . .

State courts and the district courts of the United States have concurrent jurisdiction of ERISA actions asserted

by a participant or beneficiary to recover benefits due under the terms of an employee benefit plan, to enforce rights under the terms of a plan, or to clarify rights to future benefits under the terms of a plan. In all other civil actions, the district courts of the United States have exclusive jurisdiction. 29 U.S.C. § 1132(e)(1), (a)(1)(B).

Here, the Plan provided for payment of accidental death benefits to eligible employees killed while traveling on company business. On August 4, 1982, just two months after he was hired, Dale Gorman was killed in an automobile accident while allegedly traveling on company business. Appellants filed a claim with Tenneco for the $250,000 worth of coverage provided under the Plan for his death. Tenneco conducted its own internal investigation of the facts and circumstances surrounding the accident and, in spite of evidence supporting the fact that Dale Gorman was en route on company business, informed both appellants and LINA that there was no evidence to support the contention that Dale Gorman was "in travel and sojourn" for Tenneco at the time of his death. LINA accepted Tenneco's determination without conducting its own investigation, and refused payment on the claim. Neither Tenneco nor LINA ever attempted to assist appellants by helping them gather the necessary documentation for the proof of loss.

On June 20, 1983, appellants filed suit against both Tenneco and LINA, pleading causes of action for: 1) breach of contract; 2) common law fraud; 3) breach of fiduciary duty; 4) breach of duty of good faith and fair dealing; 5) negligence; 6) statutory violations under Tex.Ins.Code Ann. art. 21.21 (Vernon Supp. 1988); 7)

violations of applicable regulatory orders issued by the State Board of Insurance; and 8) deceptive trade practices under the Tex.Bus. & Com.Code Ann. §§ 17.46-17.62 (Vernon Supp.1988).

Appellants requested issues supporting several statutory and common law causes of action, including misrepresentation, fraud, breach of fiduciary duty, and breach of duty of good faith and fair dealing. The jury found, in answer to Special Issue No. 1, that Dale Gorman was in "travel and sojourn" on the business of Tenneco; in answer to Special Issue No. 2, that Tenneco misrepresented material facts; in answer to Special Issue No. 7, that Tenneco breached its fiduciary duty with regard to its handling of the claim under the Plan; and in answer to Special Issue No. 15, that LINA breached its duty of good faith and fair dealing in its handling of the claim under the Plan.

Appellants failed to request an issue asking whether LINA or Tenneco had acted arbitrarily or capriciously in denying benefits under the Plan.

The appellees filed a motion for judgment n.o.v. or, in the alternative, a motion to disregard the jury's findings. The trial court granted the motion to disregard the jury's finding that Dale Gorman was in "travel and sojourn" for Tenneco, and granted the motion for judgment n.o.v. The trial court expressed no opinion on the jury's answers to the remaining issues.

The record reflects that both Tenneco and LINA maintained throughout the proceedings that ERISA pre-empted appellants' state law claims relating to the Plan. LINA filed a motion to strike the claims relating to the Plan. At a pretrial hearing, Tenneco and LINA both argued that

appellants' claims were pre-empted by ERISA. The trial court overruled the appellees' motions to strike the claims. Further, Tenneco asserted ERISA pre-emption as a ground in its motion for judgment n.o.v. Both Tenneco and LINA repeatedly asserted ERISA pre-emption in various objections made at trial to the admissions of evidence concerning the Plan, and in objections to the charge.

Appellants repeatedly ignored this argument during trial, and denied they were making any claims under the ERISA statute. They pursued and developed this action on the basis of state statutory and common law causes of action. Having raised ERISA at trial, Tenneco and LINA alternatively defended on the merits of appellants' state law claims.

[1] Appellants argue that Tenneco and LINA waived ERISA pre-emption by failing to raise it as an affirmative defense. A claim of federal pre-emption is a challenge to the court's subject matter jurisdiction and cannot be waived. *International Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 106 S. Ct. 1904, 90 E.Ed2d 389 (1986); *Barry v. Dymo Graphic Sys., Inc.,* 394 Mass. 830, 478 N.E.2d 707 (1985).

[2] The ERISA pre-emptive provision is to be broadly construed. *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 101 S. Ct. 1895, 68 L.Ed.2d 402 (1981). The exceptions to pre-emption appear in 29 U.S.C. §§ 1003 and 1144. Neither provisions applies to this case.

[3] A long line of federal cases has held that claims for ERISA plan benefits and attorney's fees asserted in the form of both state statutory and state common law causes of action are pre-empted by ERISA. The U.S. Supreme Court has recently held in *Pilot Life Ins. Co. v.*

Dedeaux, __U.S.__, 107 S. Ct. 1549, 95 L.Ed.2d 39 (1987), that ERISA pre-empts state common law actions based on the improper handling of a claim for benefits under an employees' group insurance policy. In that case, the employee sued the insurance company on various contract and tort theories under Mississippi law, based on the company's failure to pay benefits. The Supreme Court rejected the employee's argument that state common law bad faith actions against insurers were saved from pre-emption under the "insurance savings clause," 29 U.S.C. § 1144(b)(2)(A), which states that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . . ." The Court held that a common sense view leads to the conclusion that in order to "regulate insurance," a law must not simply have an impact on the insurance industry, but must be specifically directed toward that industry.

In *Pilot Life*, the Court also held that ERISA's civil enforcement provisions were the exclusive vehicle for the prosecution of actions by plan beneficiaries for plan benefits. The Court stated that, "[T]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life Ins. Co.*, 107 S. Ct. at 1556.

The Ninth Circuit has repeatedly held that ERISA pre-empts state statutory and common law causes of action. *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985) (claims based on breach of implied covenant of good faith and fair dealings); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865,

106 S. Ct. 183, 88 L.Ed.2d 152 (1985) claims based on breach of contract and fraud and deceit); *Winterrowd v. David Freeman & Co.*, 724 F.2d 823 (9th Cir. 1984) (claim for punitive damages preempted); *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983), *rev'd on other grounds*, 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed.2d 96 (1985) (claims based on violation of state laws authorizing causes of action for the improper handling of claims under benefit plans).

In *Jackson v. Martin Marietta Corp.*, 805 F.2d 1498, 1499 (11th Cir. 1986), the court noted that there are few state laws found to be beyond the scope of ERISA's pre-emption provision, 29 U.S.C. §§ 1144(a),(c)(1).

The Fifth Circuit, in *Light v. Blue Cross & Blue Shield*, 790 F.2d 1247 (5th Cir. 1986), has held that acitons for bad faith refusal to pay claims, intentional infliction of severe emotional distress, negligent infliction of severe emotional distress, breach of fiduciary duty, and deceit are all pre-empted by ERISA. In that case, the court concluded that there was a direct connection between the state laws and the employee benefit plan. *Id.* at 1249.

This Court has held, in *Sams v. N.L., Indus., Inc.*, 735 S.W.2d 486 Tex. App.—Houston [1st Dist.] 1987, no writ), that ERISA pre-empts state causes of action for claims for sick and disability pay benefits and for severance pay, as they relate to a benefit plan.

Further, this Court held in *Felts v. Graphic Arts Employee Benefit Trust*, 680 S.W.2d 891 (Tex. App.—Houston [1st Dist.] 1984, no writ), on a claim asserting unfair and deceptive trade practices in violation of the Texas Insurance Code and the Texas Deceptive Trade Practices Act, that a claim for relief governed by ERISA does

not constitute an alternative ground for relief, because if ERISA applies, it completely displaces other applicable state laws.

Appellants' state law claims are "related to" the payment of benefits under the Plan and are thus pre-empted by the federal law and governed by the provisions of the ERISA statute. Under 29 U.S.C. §§ 1132(e)(1) and (a)(1)(B), the state district court has jurisdiction to adjudicate only appellants' claims for benefits due under the plan.

[4] We assume, without deciding, that appellants' pleadings were broad enough to support such an action. *See Gulf, C. & S.F. Ry. Co. v. Bliss*, 368 S.W.2d 594 (Tex. 1963); Tex. R. Civ. P. 45.

To establish a right to benefits under ERISA, the appellant's burden was to prove that the appellees acted arbitrarily or capriciously in denying their claim for benefits. *Denton v. First Nat'l Bank of Waco, Texas*, 765 F.2d 1295, 1303-1304 (5th Cir. 1985); *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 313-314 (5th Cir. 1982); *Paris v. Profit Sharing Plan for Employees of Howard B. Wolfe, Inc.*, 637 F.2d 357, 362 (5th Cir. 1981); *Bayles v. Central States, Southeast and Southwest Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir. 1979).

Appellants did not meet their burden under this standard, as there is no evidence or finding that the appellees acted arbitrarily or capriciously in denying appellants' claim for benefits. *Felts v. Graphic Arts Employee Benefit Trust*, 680 S.W.2d at 894; Rex. R. Civ. P. 279.

Because the court below lacked jurisdiction of appellants' state law claims, the court erred in entering judgment n.o.v. Further, because there was no evidence or finding

on the necessary element of the cause of action for ERISA benefits, judgment should have been rendered for appellees on that cause of action.

The judgment n.o.v. is reversed, and judgment is rendered that appellants take nothing from Tenneco, Inc., and LINA. Tex. R. App. P. 81(c).

THE SUPREME COURT OF TEXAS

No. C-7806

PAMELA CHAMBERS GORMAN, INDIVIDUALLY AND AS ADMINISTRITRIX OF THE ESTATE OF DALE OWEN GORMAN, DECEASED, AND AS NEXT FRIEND OF AMANDA MARIE GORMAN, A MINOR,
Petitioner

vs.

LIFE INSURANCE COMPANY OF NORTH AMERICA and TENNECO, INC.,
Respondents

From HARRIS County,
FIRST District.

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the First District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed in part and affirmed in part.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) That portion of the judgment of the court of appeals that petitioners take nothing from Tenneco is affirmed;

2) As to petitioners' claims against Life Insurance Company of North America, the cause is reversed;

3) This cause is remanded to the Court of Appeals for the First District for further proceedings in conformity with the opinion of this Court;

4) Pamela Chambers Gorman, Individually and as Administratrix of the Estate of Dale Owen Gorman, Deceased, and as next friend of Amanda Marie Gorman, a Minor, shall recover from Life Insurance Company of North America, which shall pay, the costs in this Court.

A copy of this judgment and of the Court's opinion is certified to the Court of Appeals for the First District. The original record and all instruments filed with the court of appeals shall accompany the mandate of this Court to the Court of Appeals for the First District.

(Opinion of the Court delivered by Justice Gonzalez)

Concurring Opinion by Justice Doggett joined by Justice Mauzy and Justice Gammage)

January 30, 1991

* * * * *

UNITED STATES STATUTES

29 U.S.C. § 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of

this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respct[1] to a violation of or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be en-

forceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving deliquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fees and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A).

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be

served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975 (f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

29 U.S.C.§ 1144

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrange-

ment and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and

which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

UNITED STATES CONSTITUTION

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.